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January 24, 2005
By email MSC_Clerk@courts.mi.gov

Michigan Supreme Court
Clerk's Office
PO Box 30052
Lansing, MI 48909

RE: ADM File No. 2003-62
Proposed Adoption of New Michigan Rules of Professional Conduct

Dear Justices of the Supreme Court:

I write to comment on proposed amendments to the Michigan Rules of Professional Conduct. I have practiced in the professional responsibility field for over two decades, and currently concentrate my practice in that field. I have both a national and local perspective, and have applied the rules in government, in-house, and private practice settings. I have a long history of teaching and writing in the field.

The ABA Ethics 2000 Commission and other ABA entities have proposed a number of thoughtful amendments to the Model Rules of Professional Conduct for states to consider. Although a case may be made for striving toward national uniformity, some of the ABA changes do not comport with the Michigan experience. There are a number of instances within the Model Rules of Professional Conduct where the ABA touches upon issues of substantive law, issues which are not resolved in ethics rules but elsewhere in a state's laws or rules. No ABA proposal can resolve those issues of substantive law consistently for all state variations. Therefore the ABA Model necessarily raises the substantive issue, and leaves it to the various states to address when they adopt local versions of the rules. Other portions of the proposed amendments are not substantive changes to the Model Rules, but are substantive changes to the Michigan Rules.

Proposed Rule 1.0.2 – Current Rule 1.0: Ethics rules as basis for civil liability. I endorse the comments filed by Keefe Brooks regarding this rule, and recommend deleting the sentence added in par 20, "Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct."

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The ABA Model never had a black-letter rule on the effect of ethics rules in civil proceedings, and states treat the issue differently. In 1988 when the Michigan Supreme Court adopted the current rules, a black-letter rule, MRPC 1.0(b), was added for clarification. The ABA Model language, that a violation of the rules ***should*** not constitute grounds for civil enforcement, was strengthened by the Michigan Supreme Court to ***does*** not constitute grounds. See Scope, par 19-20. The bar had been and continues to be concerned that ethics duties would become standards for liability, and the black letter rule was given a prominent place in MRPC 1.0 to answer those concerns.

States that did not directly address the civil liability question in ethics rules have faced confusion and litigation as they attempt to resolve the issue. These issues get raised in private disputes between parties, and not in the regulatory setting where the ethics rules were developed and intended.

Proposed Rule 1.2(d) – Current Rules MRPC 1.2(c) and (d), Parameters of client counseling. The proposed rule would restrict a lawyer from counseling a client on conduct that is ***criminal*** or fraudulent. The current Michigan rule restricts the lawyer from counseling on conduct that is ***illegal*** or fraudulent. The most common illustration of the difference is a lawyer advising on a contract imposing usurious interest – the client's conduct would be illegal, but not criminal. The current Michigan rule also coordinates with a lawyer's discretion in MRPC 1.6(c)(3) to reveal confidences of a client "to rectify the consequences of a client's ***illegal*** or fraudulent act in the furtherance of which the lawyer's services have been used." The current Michigan rule 1.2(d) also requires the lawyer to counsel a client on the limitations of ethics rules. One of the major changes urged by the ABA Ethics 2000 Commission was to more clearly delineate proper client counseling, client informed consent, and client communication. Retaining MRPC 1.2(d) is consistent with the ABA mission. The current Michigan rules better protect the client and the administration of justice. I note that Michigan rule 1.6(c)(3) also contains the "illegal or fraudulent act" terminology, instead of the ABA "criminal or fraudulent act," and it is recommended for retention. Current MRPC 1.2(c) and (d) should also be retained.

Proposed Rule 1.5(c) – Contingent fees. The proposed rule requires a lawyer to advise a client whether the expenses will be deducted ***before or after*** the contingent fee is calculated. MCR 8.121 currently requires calculation off the net recovery. One could interpret MCR 8.121 as only applying to personal injury and wrongful death cases, leaving it to the lawyer to offer contingent fees in other cases calculated off the gross. One could also read MCR 8.121 as an indicator that all calculations should be off the net, even for non-tort causes of action. Contingent fee arrangements are frequently misunderstood by the public and are frequently the subject of legislative attack, but their use is growing. Contingent fees are used in collection matters, estate matters, bankruptcy matters, and in defending business clients. Personal injury matters are capped at 1/3 net recovery cap under MCR 8.121, while other cause of action are unregulated. The ABA Model language invites the state to select whether contingent fee calculations will be made off the net or the gross. Calculation of a contingent fee should be standardized within the jurisdiction.

Proposed Rule 1.5(e) – Division of fees. The proposed rule would allow division of fees between lawyers who are not in the same firm only when the handling attorney advises the client and obtains written consent. The current Michigan rule allows division of fees when any of the

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lawyer involve notify the client, and the client does not object. The current rule is preferable for several reasons. First, the referring lawyer has an interest in ensuring that the client is notified about the division, and has no way to force the receiving lawyer to provide that notification. Second, since the referring lawyer probably has a stronger relationship with the client, may have more client confidence, and is better able to explain the division and obtain consent than the lawyer who is meeting the client for the first time. Third, the fee division is a contract between the lawyers to define the share of each. Since the client is not a party to the contract, the client's "consent" should not be necessary. Further, if the client's consent is required, issues will arise regarding the client's withdrawal of consent during or after the case has concluded. See, Idalski v Crouse Cartage Company, 229 F. Supp. 2d 730 (EDMI 2002). Finally, disputes under this rule arise between the lawyers, i.e. on their referral contract, and not between lawyers and clients; since 1988 when the current rule was adopted, there have been no public disciplinary cases. For these reasons, the current Michigan rule should be retained, or the State Bar recommendation should be adopted.

Proposed Rule 1.5(f) – Nonrefundable retainers. The proposed rule would explicitly permit nonrefundable retainers. The ABA Model was created partially in response to case law in other states where nonrefundable retainers are prohibited. Michigan does not prohibit nonrefundable retainers, but the proposed rule merely incorporates the criteria from Michigan ethics opinion RI-10, which in turn merely applies MRPC 1.5(a), the general requirements of a reasonable fee, to the specific facts set forth in the opinion. The conclusion in RI-10 is limited to the facts of the opinion, should not be used as the only criteria for all circumstances, and may be too limiting. For example, a lawyer expert witness may charge a nonrefundable fee in order to review materials related to the case and to list the lawyer as a witness. The engagement prevents the lawyer from undertaking matters on issues that conflict with the issues in the case, as well as cases with conflicting parties. The reputation of the lawyer expert may also encourage early settlement. While the engagement fits within MRPC 1.5(a), it does not easily fit the criteria proposed from RI-10. I suggest that MRPC 1.5(a) is sufficient and proper regulation of nonrefundable retainers, and an additional rule is not necessary.

Proposed Rule 1.6(b) – Confidentiality duties. The proposed rule would do away with the distinction of "confidences and secrets" and would protect all "information relating to the representation of a client." The protection is too broad, and would change the manner in which lawyers market their services (by revealing the kinds of work done for other clients), the ability of lawyers to obtain bank loans and services (where some client information is required as collateral), and would greatly inhibit how lawyers reveal conflicts of interest and obtain client waivers. For example, a prospective client seeks assistance in a matter that raises a waivable conflict with an existing client. Under current rules, the lawyer would tell the prospective client that the firm represents a conflicting client, and ask whether the prospective client will give permission to tell the current client enough to obtain a waiver. Under the proposed rule change, the lawyer would be required to ask the current client for permission to tell the prospective client that a conflict exists; the current client would have no incentive to grant permission. The existing formulation of "confidences and secrets" actually assists the lawyer in determining what may be disclosed, since "confidences" are coterminous to "privileged information." Combining the two types of information under one general heading blurs the distinction and makes it difficult to explain to a client what may be protected under the evidentiary standard. I suggest that the amendment be rejected.

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Proposed Rule 1.8(e) – Client responsibility to pay litigation expenses. The proposed rule would change current rules and permit a lawyer and client to make repayment of litigation expenses contingent upon the outcome of the case. The comments provided by the State Bar do not highlight this substantive change.

Proposed Rules 1.8(j), 1.10 – Imputed conflicts. Proposed rule 1.8(j) greatly expands the kinds of situations in which the conduct of one lawyer in a law firm is imputed to all lawyers in the firm. Under current Rule 1.10(a), the only imputed conflicts are those arising under MRPC 1.7, 1.8(c), 1.9(a) or (c), or 2.2. The proposed rule makes all lawyers in the firm responsible when one has sex with a client, or has a personal business transaction with a client, or gives financial assistance to a client, etc. The proposed rule and the ABA Model are inconsistent with Rule 1.10(a) of their respective codes. Rule 1.10(a) specifically excludes prohibitions "based on a personal interest of the prohibited lawyer." The conduct described in Rule 1.8 is frequently conduct about which the other lawyers in a firm could not know, and could not monitor. I suggest that the amendment be rejected.

Proposed amendment 1.10(e) states that "the disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11." Under Rule 1.11, disqualification is not imputed unless the lawyer participates "personally and substantially," and then only if the lawyer is not screened. Under Rule 1.10, the level of participation does not matter if the lawyer acquired confidential information material to the case, but the lawyer may still be screened. The rules assume that government service and private practice are consecutive.

In reality, a growing amount of government service is not consecutive, but is concurrent with the lawyer's private practice. Many lawyers work for government entities part-time, maintain a private practice while sometimes engaging in public work, serve under a bid contract as counsel for a governmental entity, are specially appointed for government work on a case by case basis, or are the beneficiaries of outsourcing. Neither Rule 1.10 nor 1.11 adequately address concurrent service. The ethics opinions that have addressed these in-and-out situations for government work apply Rule 1.11 from the perspective of government work, but also apply Rule 1.9 and 1.10 from the perspective of the private practice – these rules are applied to the same lawyer who wears both government and private hats.

Since the part-time government work is so commonplace in Michigan, I suggest that proposed amendment 1.10(e) be rejected.

Proposed Rule 1.11(c) – Former government lawyer representing private client. The current Michigan rule provides that "a lawyer having information that the lawyer ***knows*** is confidential government information about a person, acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person." The proposed rule would increase the lawyer's duty from "know" to "reasonably believes, after diligent inquiry and careful consideration." This change is impractical, since once the lawyer leaves government for private practice, the lawyer no longer has means to make "diligent inquiry" and still protect confidences and secrets of the prospective client. Further, the change

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imposes a different standard for former government lawyers than is required for private practitioners under Rule 1.9(b). The change should be rejected.

Proposed Rule 1.15(a) – Safekeeping property. The proposed amendment deletes Michigan language describing the types of institutions where client trust accounts may be placed, i.e. "banks, savings and loan associations, or credit unions." The Michigan language avoids investment accounts of high risk or controlled by the lawyer, and should be retained.

Proposed Rule 1.18 - Prospective clients. The Comment to the proposed amendment indicates that a prospective client should not be afforded as much protection as a former client under Rule 1.9. While Rule 1.9 prohibits representation when a new matter is "materially adverse" and "the same or substantially related," the proposed rule applies those criteria and ***adds*** the requirements that information gained from the prospective client "could be" "significantly harmful" to the prospective client in the new matter, and notice of screening. There is no requirement that the information be material to the new matter, no guidance on what constitutes "harm" or what harm is "significant," and no time limits for how long the duty lasts. By definition, the lawyer has had no relationship with the prospective client, and therefore may not have any means of contacting the prospective client to give notice of screening. Even if the lawyer has kept records of what information was gained from the prospective client (a very unlikely situation, since files are generally not maintained for non-clients), the lawyer has no basis upon which to conclude the information "could be" "significantly harmful." The proposed rule does not recognize that many clients are sufficiently sophisticated to "shop" numerous attorneys, hiring none, intending to disqualify them from representing the opposition.

Cases that have considered prospective client problems have found that a lawyer owes a duty of confidentiality, but that a lawyer does not owe a duty of loyalty unless the information shared by and the lawyer's response to the prospective client created a de facto attorney-client relationship, thereby affording the prospective client the same protections as a former client. See, e.g., Banner v Flint, 136 F Supp 2d 678 (ED MI 2000). See also, Bridge Products Ins, v Quantum Chemical Corporation, 1990 US Dist LEXIS 5019 (ND IL), was confidential information exchanged with the expectation that the law firm would be acting for the prospective client, or only with the expectation that the law firm would be determining whether it could; Richardson v Griffiths, 251 Neb. 825; 560 N.W.2d 430 (Neb 1997), did the attorney expressly or impliedly agree to give or actually give the desired advice or assistance.

The courts acknowledge that the lawyers owed no *ethics* duties, but determined that under certain circumstances fiduciary duties could be found to exist. It makes little sense to create such duties to nonclients in a code of professional ethics. If the Court determines that some guidance should be given for prospective clients, I suggest that paragraph (b) of the proposed rule is sufficient.

Proposed 2.3 – Evaluator. Current Michigan Rule 2.3 requires a lawyer evaluator to obtain client consent in every instance in which the lawyer is asked to provide an evaluation. The proposed rule would only require client consent when the lawyer knows (or should know) the evaluation "is likely to affect the client's interests materially and adversely." Evaluations may be requested by persons other than the client. A lawyer should never provide an evaluation, even if favorable to the client and even if only marginally adverse, without the client's informed

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consent. The current Michigan rule should be retained, with the "informed consent" formulation substitute for "consent after consultation."

Proposed 2.4 – Third party neutral. Although well-intentioned, the proposed rule creates confusion on several issues. First, the language does not contemplate a party-designated arbitrator, facilitator, etc., where that bias should be disclosed with some detail if the lawyer is to be selected with informed consent. Second, paragraph (b) requires the lawyer to clarify his/her role only if the parties are unrepresented, when the role should be clarified in all instances since the lawyer is not acting as lawyer for any party. Third, it is not clear whether the lawyer's service in this capacity imputes to other members of the firm, or whether representation of a party by other members of the firm disqualifies the lawyer under this rule. At a minimum, the rule should mandate disclosure of conflicts of interest and should require confidentiality except for purposes of the service, or as required by law.

Proposed 3.3 – Candor to the tribunal. There have been national debates about this rule, arguing about the correct balance between duties to clients (particularly criminal defendants) and duties to the tribunal. The proposed rule makes several substantive changes. (1) The proposed rule drops the current requirement that a lawyer has an affirmative duty under MRPC 3.3(a)(2) to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. The proposed rule only requires the lawyer to correct lawyer statements. Proposed paragraph (b) does not fill this gap, since it only applies to adjudicative proceedings and makes the duty to correct discretionary. (2) The proposed rule broadens the lawyer's duty by requiring the lawyer to correct false material evidence of ***any witness*** called by the lawyer. (3) The proposed rule broadens the lawyer's duty by requiring that the lawyer take remedial measures if ***anyone***, not just the client, engages in criminal or fraudulent conduct related to the proceeding, regardless of whether the lawyer's services have been used in furtherance of that conduct. I note that MRPC 1.6(c)(3) [proposed rule 1.6(b)(2)] only permits disclosure when the lawyer's services have been used in furtherance of the client's illegal or fraudulent act, that the State Bar comment to Rule 1.6 says that it wants the Michigan rule retained, but that Proposed Rule 3.3(c) overrules Rule 1.6. I suggest that current Michigan rule 3.3 be retained.

Proposed 3.5(c) and (d) – Impartiality of the tribunal. The ABA has a history of limiting contacts with jurors; Michigan dropped the ABA rule (former DR 7-108) in adopting the Rules of Professional Conduct in 1988. The Reporter's Comment to the ABA Model Rules notes that limitations on contact with jurors has been challenged as constitutionally overbroad. Rapp v. Disciplinary Board of the Hawaii Supreme Court, 916 F. Supp. 1525 (D.Hawaii, 1996). Paragraph (a) already prohibits contacts "prohibited by law," and other rules (Rule 4.1, 4.4, 8.4) adequately deal with lawyer behavior. I am not aware of any jury contact misconduct in Michigan that would warrant a return to the vulnerable ABA approach.

Whereas current Michigan paragraph (c) prohibits undignified or discourteous conduct toward the tribunal, proposed paragraph (d) prohibits any conduct "intended" to disrupt a tribunal. The ABA formulation would require a disciplinary agency to prove the lawyer's intent to disrupt, instead of pursuing the conduct itself. For these reasons, I suggest that the current Michigan rule be retained.

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Proposed 3.6 – Trial publicity. The current Michigan rule has never been challenged on constitutional grounds, while the ABA formulation has been attacked several times and the ABA Model Rule amended in response to those attacks. In Gentile v State Bar of Nevada, 501 US 1030 (1991), where the Nevada version of the ABA Model Rule was challenged, Chief Justice Rehnquist's majority opinion clearly articulates the nature of the restrictions on lawyer speech that were tolerated by the Court:

> "The regulation of attorneys' speech is limited -- it applies only to speech that is *substantially likely to have a materially prejudicial effect*; it is neutral as to points of view, applying equally to all attorneys participating in a pending case; and it merely postpones the attorneys' comments until after the trial. While supported by the substantial state interest in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity, the Rule is limited on its face to preventing only speech having a substantial likelihood of materially prejudicing that proceeding." Gentile, 501 US at 1076, emphasis added.

This is precisely the language that the Michigan rule presents. I suggest that the current Michigan rule be retained, with the ABA "guidance" retained in commentary.

Proposed 4.2 – Communication with represented party. I suggest adoption of Alternative A, without the paragraph proposed at Comment (10). The paragraph at Comment (10) relating to government lawyers should be rejected. (1) The "law" governing the actions of government lawyers changes with legislation and court decisions. There should be no attempt to capsulize all those laws or to insulate government lawyers in advance regarding contacts under those laws. (2) Generally, one type of lawyer or law practice should not be "excused" from compliance with professional rules that apply to their lawyer opponents. (3) It is particularly important that government lawyers be held to the high standards of the profession, since government has the most power to impose its will upon the citizenry. It is crucial that the manner in which the lawyers for such a powerful party operate be beyond reproach. (4) More lawyers are employed by governmental entities than by any other client – over four hundred lawyers are employed by the Michigan Office of the Attorney General, the largest "law firm" in the state. When lawyers for local governmental entities are added, the exception swallows the rule. (5) Although the plea for lenience under this rule has traditionally been heard by criminal prosecutors in their investigative roles, the comment extends the exception to every government civil investigation – from civil rights violations to occupational licensing to building permits to pension benefits to corporate filings, etc. The scope of the comment is beyond any debate that has been conducted.

The arguments presented above also support rejection of Alternative B, which places the substance of Comment (10) in black letter. If the government lawyer's contacts are "authorized by law," the additional language is not needed. If the contacts are not authorized by law, government lawyers should not be exempt from the rule merely because they are engaged in investigation or prosecution.

Proposed 4.3 – Communication with unrepresented person. The Reporter's Comment to the ABA Model rule explains the addition of the third sentence as follows:

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> "Under the ABA Model Code of Professional Responsibility, DR 7-104(A)(2), a lawyer was prohibited from giving advice to an unrepresented person, other than the advice to secure counsel. This statement is presently contained in the Comment to Model Rule 4.3. Although the cases generally perceive no change of substance in the Rule, it has been reported that, in negotiations between lawyers and unrepresented parties, the giving of legal advice (often misleading or overreaching) is not uncommon. Of the jurisdictions that have adopted the Model Rules, 11 have included a textual provision similar to the prohibition on giving legal advice in the Model Code.
>
> "The reason for the initial decision to delete the Model Code prohibition from text was the difficulty of determining what constitutes impermissible advice-giving. The Commission recommends that language be included in the Comment that addresses the application of the textual prohibition in some common situations. Although the line may be difficult to draw, it is important to discourage lawyers from overreaching in their negotiations with unrepresented persons."

If the Reporter's Comments have merit, a lawyer for an interested party should never be giving advice to an unrepresented person, other than the advice to secure counsel. That should not affect a lawyer from determining whether the lawyer may properly represent the interests of both the client and the party under other conflict rules. The qualifying language "if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client" should be rejected.

Proposed 5.4 – Professional independence. The proposal changes terminology in paragraph (d) from "authorized to practice law" to "engaged in the practice of law." Under this change, a law firm could have a nonlawyer shareholder or director as long as the law firm does not in fact practice law – for instance, the law firm only conducts IRS in-kind exchanges, or only engages in financial counseling, or only engages in litigation support services. It could be argued that these activities are not "the practice of law" since each of them may be conducted by nonlawyers, yet the umbrella housing the service holds itself out as a "law firm." It should not matter what the firm actually does – what matters is what it is legally authorized to do. I suggest the Michigan language be retained.

Proposed Rule 5.5 – Unauthorized practice of law. The unauthorized practice of law is one arena where ethics rules and substantive law of the particular jurisdiction interrelate. The ABA Model rule has been proposed in total, without sufficient consideration of interrelating Michigan law. The proposed rule is inconsistent with MCL 600.916, State Bar of Michigan Rule 15 Sec 2, and Rittenhouse v Delta Home Improvement Inc, 291 F.3d 925 (CA6 2002). Since the federal district courts in Michigan currently apply the Michigan Rules of Professional Conduct to practice before their courts, it should be noted that the proposed rule is inconsistent with Local Rule 83.20 of the US District Court for the Eastern District of Michigan, and Local Rule 83.1of the US District Court for the Western District of Michigan. The proposed rule should not be adopted without comparable and contemporaneous changes in the other laws.

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Proposed Rule 5.6 – Restrictive covenants. The deleted cross reference to MRPC 1.17 (buying a law practice) should be reinstated in the black letter rule. Although a mention has been included in the Comment, Comment is not controlling and the remaining black letter cannot be stretched to include MRPC 1.17.

Proposed Rule 6.1 – Pro bono activities. MCR 9.104 states that conduct violating the rules of professional responsibility are misconduct and grounds for discipline to be pursued by the Attorney Grievance Commission. If the proposed rule is not intended to be enforced by the Attorney Grievance Commission, either MCR 9.104 should be contemporaneously amended, or the proposal should be rejected.

Proposed Rule 7.2(c) – Advertising. The proposal authorizes lawyers to advertise as permitted by rule 7.1, 7.2, and 7.3, whereas the current Michigan rule authorizes advertising that complies with all rules. For example, in some states a lawyer may not advertise or solicit for work if the lawyer is not licensed in the jurisdiction where the case arises, under the reasoning that the lawyer would be engaged in unauthorized practice of law. Yet rule 5.5, the rule on unauthorized practice, has been deleted from the cross reference in the proposed rule.

Second, the proposal uses the term "qualified lawyer referral service." The ABA Reporter's Comments state that the terminology was chosen "to more closely conform the Model Rules to ABA policy with respect to lawyer referral services." But Michigan has not adopted the ABA policy on lawyer referral services, and the current Michigan program is retained at Rule 6.3. "Qualified lawyer referral service" has no meaning in the Michigan rules.

Third, in 1988 Michigan rejected the ABA model that required a lawyer's name in the advertising. The proposed rule includes that requirement and adds a requirement to include the lawyer's address. In the absence of some evidence that Michigan has a spate of advertising problems that would be remedied by these additional requirements, they are not warranted.

Proposed Rule 7.3 – Solicitation. The current Michigan rule permits solicitation when there is a "family or prior professional relationship." The proposed rule expands the permissible categories to include "close personal" relationship. In 1988 Michigan rejected the ABA model that required labeling the communications as "advertising." In the absence of some evidence that Michigan has a spate of advertising problems that would be remedied by these additional requirements, they are not warranted. The proposed rule specifically mentions "electronic" contacts, but it may not be clear whether that terminology is sufficient to cover satellite and other wireless communications.

Proposed Rule 7.4 – Specialization. The simplicity of the current Michigan rule has avoided litigation faced by other states, and has allowed interpretation to be guided by developing case law. The ABA Model is based in part upon the ABA specialization program, which has not been adopted in Michigan. I suggest the current Michigan rule be retained.

Proposed Rule 8.3 – Reporting duties. The current Michigan rule providing a reporting exception for Lawyers and Judges Assistance (LJA) programs was the subject of heated debate and negotiation. Although there was a desire to encourage an affected lawyer or judge to get help, there was also the desire to protect the public in the event the lawyer or judge refused to get

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help, failed to complete a recommended treatment program, or the treatment program failed. Therefore the Michigan rule does not require reporting if (1) the information is gained by a lawyer "*while serving as an employee or volunteer"* of (LJA), and (2) only to the extent the information would be protected by Rule 1.6 if the disclosure were between lawyer and client.

The proposed amendment would excuse reporting by any lawyer or judge while participating in LJA – this includes not just counselors in the program, but fellow counselees. Also, the proposed amendment exempts from disclosure any information, not just information that would be protected under rule 1.6. As drafted, the exception is much too broad, and could protect malingerers at the expense of clients and the public.

Proposed Rule 8.4(b) – Misconduct. The proposal at paragraph (b) states that it is misconduct to "commit a criminal act *that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer.*" This is inconsistent with MCR 9.104(A)(5), which states that misconduct is "conduct that violates a criminal law," and the holding in Grievance Administrator v Deutch, 455 Mich 149 (1997), that the filing of any judgment of conviction against an attorney constitutes evidence of "misconduct" subjecting the attorney to an order of discipline, regardless of whether the conviction, on its face, reflects adversely on the attorney's honesty, trustworthiness or fitness as a lawyer. Either MCR 9.104 should be contemporaneously amended, or the proposal should be rejected.

Proposed Rule 8.5 – Jurisdiction. The proposal is based in part upon the ABA multijurisdictional practice recommendations and ABA Model Rule 5.5, unauthorized practice. As indicated above, ABA Model rule 5.5 is inconsistent with Michigan law.

In addition, the choice of law provisions in paragraph (b) should be rejected on the merits. An example shows that the rule creates more problems than it resolves:

> A plane takes off from Massachusetts, then crashes in Virginia on its way to Florida. Potential clients are the airlines (headquartered in Pennsylvania), the airports (Massachusetts and Florida), the airline equipment manufacturers (headquartered in Washington state), the surviving passengers (various states) and the deceased passengers' families (various states). What ethics rules apply?

Paragraph (b)(1) states that for "conduct in connection with a matter pending before a tribunal," the ethics rules of the forum apply. If a Maryland lawyer solicits clients in Massachusetts to sue the airline in Florida, then the rule would have Florida rules govern the lawyer's solicitation, engagement, referral agreement, and conflict resolution. The Florida rules would be applicable even though all of the conduct occurred prior to filing the lawsuit.

On the other hand, paragraph (b)(2) provides that nonlitigation matters are controlled by the ethics rules "of the jurisdiction in which the lawyer's conduct occurred," or where "the predominant effect of the [lawyer's] conduct" occurred. If the Maryland lawyer solicits the equipment manufacturers (headquartered in Washington) to arbitrate on-line with the airline (based in Pennsylvania), the lawyer need only comply with Maryland rules (since the lawyer never travels). Or if another state's rules are more advantageous for the lawyer, could the lawyer claim the "predominant effect" is in Virginia, where the crash occurred and evidence sits, or is

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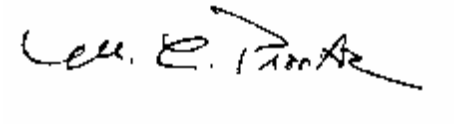
the "predominant effect" more properly in Washington or Pennsylvania where the parties are based?

The ABA Model rule formulates one viewpoint on the substantive issues of choice of law, and attempts to have them promulgated throughout the states as a rule of ethics. As such, proposed paragraph (b) is misplaced and should be rejected. In operation, the ABA Model creates more problems than it resolves. Paragraph (b) should be rejected.

Thank you for this opportunity to comment on this important subject.

Sincerely,



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